Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT WRIGHT, Director of the Illinois Department of Public Aid and successor in office to PHIL BRADLEY, Former Director of the Illinois Department of Public Aid, and MARALEE I. LINDLEY, Director of the Illinois Department on Aging, and successor in office to NANCY NELSON, former Acting Director of the Illinois Department on Aging,

Petitioners,

v.

FRANCES J., by her guardian, PATRICK T. MURPHY, on her own behalf and on behalf of all others similarly situated,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a state-court action that includes claims for retrospective damages and prospective injunctive relief is brought against state officials in their official capacities and is removed by the defendants to federal court, does the federal court have jurisdiction to decide those claims that are not barred by the Eleventh Amendment?

PARTIES IN THE COURT BELOW

Frances J. and Willa B., by their guardian, Patrick T. Murphy, initiated this action on their own behalf and on behalf of all others similarly situated. No class was certified by the district court, and both plaintiffs were appellants in the court of appeals. Petitioners are informed that Willa B. died on December 19, 1993; no substitution of a representative has occurred in this litigation. Petitioners have, accordingly, omitted Willa B. as a party respondent in this Court.

Robert Wright, Director of the Illinois Department of Public Aid and successor in office to Phil Bradley, Former Director of the Illinois Department of Public Aid, and Maralee I. Lindley, Director of the Illinois Department on Aging, and successor in office to Nancy Nelson, former Acting Director of the Illinois Department on Aging, were the defendants-appellees in the court below and are the petitioners in this Court.

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IN THE

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ROBERT WRIGHT, Director of the Illinois Department of Public Aid and successor in office to PHIL BRADLEY, Former Director of the Illinois Department of Public Aid, and MARALEE I. LINDLEY, Director of the Illinois Department on Aging, and successor in office to NANCY NELSON, former Acting Director of the Illinois Department on Aging,

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PETITION FOR WRIT OF CERTIORARI

Robert Wright, Director of the Illinois Department of Public Aid and successor in office to Phil Bradley, Former Director of the Illinois Department of Public Aid, and Maralee I. Lindley, Director of the Illinois Department on Aging, and successor in office to Nancy Nelson, former Acting Director of the Illinois Department on Aging, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 19 F.3d 337. The opinion and judgment order of the district court (App. 14, 15, 37) are not reported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on March 21, 1994. Defendants filed a petition for rehearing and suggestion of rehearing in banc on April 4, 1994. On May 3, 1994, the court denied the defendants' petition for rehearing (App. 13). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1441(a)

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

STATEMENT OF THE CASE

Background

This case involves a facial and as-applied challenge to the constitutionality of the Community Care Program (CCP) administered by the Illinois Department on Aging (DOA). After being determined eligible for less than the maximum possible benefits available under the program,

the plaintiffs, acting through the Cook County Public Guardian, initiated this action on July 27, 1992 by filing a complaint and motion for class certification in the Circuit Court of Cook County, Illinois, County Department, Chancery Division. (R. Doc. 1-1, Exh. A) On August 3, 1992, defendants removed the action to the United States District Court for the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 1441. (R. Doc. 1-1) Plaintiffs did not seek to have it remanded back to state court.

Plaintiffs' Complaint

Plaintiffs' suit named as defendants two state officials in their official capacities. The complaint, which contained eight counts, alleged that defendants unconstitutionally deprived plaintiffs of the maximum benefits allowed for in-home services under the CCP. (R. Doc. 1-1, Exh. A at 19-23) Count I alleged violation of plaintiffs' substantive due process rights. (*Id.* at 19-20) Counts II through V alleged various procedural due process violations. (*Id.* at 20-22) Count VI was brought under the equal protection clause. (*Id.* at 22) Count VII alleged violations of the Rehabilitation Act of 1973. (*Id.* at 22-23) Finally, Count VIII contained a 42 U.S.C. § 1983 claim. (*Id.* at 23)

Plaintiffs requested (1) class certification, (2) an order directing the DOA to provide the named plaintiffs with "the maximum benefits allowed by law," (3) a declaration that the instrument used for a determination of need violates their procedural and substantive due process rights because it "does not take into account the mental impairments of individuals who have been declared wards of the court because of their mental disabilities," (4) a declaration that plaintiffs are immediately eligible for the maximum CCP hours under the program rules, (5) an order directing defendants to reimburse the Public Guardian for

all public funds expended on behalf of plaintiffs for services for which DOA allegedly should have paid, and (6) costs and attorney's fees. (R. Doc. 1-1, Exh. A at 23-24)

Motion to Dismiss and District Court Ruling

Defendants moved to dismiss plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1) and (6), arguing that the Eleventh Amendment barred all of plaintiffs' claims, except for those seeking prospective injunctive relief. (R. Docs. 10, 14) As to those remaining claims, the defendants argued on the merits that plaintiffs had failed to state either a procedural due process claim or an equal protection claim. On December 14, 1992, the district court dismissed plaintiffs' action for failure to state a claim for relief and declared any other pending motions moot. (R. Docs. 26, 27) The court did not address any question concerning class certification. Judgment was entered on December 15, 1993. (R. Doc. 25) Plaintiffs filed their notice of appeal on January 13, 1993. (R. Doc. 28)

Decision of the Seventh Circuit

Raising an issue that the parties had neither briefed nor argued on appeal, the U.S. Court of Appeals for the Seventh Circuit vacated the order of dismissal and ordered this case remanded to state court, finding that "[b]y the plain meaning of [28 U.S.C.] § 1441(a), an action that contains claims barred by sovereign immunity, cannot, in whole or in part, be removed from the state courts to a federal forum because it is not an action within the original jurisdiction of the district courts." (App. 5) In so ruling, the Court of Appeals aligned itself with the Fifth Circuit, which reached a similar result in *McKay v. Boyd*, 769 F.2d 1084 (5th Cir. 1985), and rejected the reasoning of the Sixth Circuit in *Henry v. Metropolitan Sewer District*, 922 F.2d 332 (6th Cir. 1990).

REASONS FOR GRANTING THE WRIT

I.

A DECISION FROM THIS COURT IS NEEDED TO STEM THE PROLIFERATION OF CONFLICTING DECISIONS WITH RESPECT TO A FEDERAL COURT'S ABILITY TO EXERCISE JURISDICTION OVER A REMOVED CASE WHERE SOME CLAIMS ARE BARRED BY THE ELEVENTH AMENDMENT.

In concluding that it was required to order this case remanded to state court, because some of the claims presented were barred by the Eleventh Amendment, the Seventh Circuit Court of Appeals established its position on an issue that has generated pronounced disagreement among the federal courts. Even as it aligned itself with the Fifth Circuit, *see McKay v. Boyd*, 769 F.2d 1084 (5th Cir. 1985), it acknowledged but rejected the reasoning and conclusion in *Henry v. Metropolitan Sewer District*, 922 F.2d 332 (6th Cir. 1990), which followed *Gwinn Area Community Schools v. Michigan*, 741 F.2d 840 (6th Cir. 1984).

The Fifth Circuit, in *McKay*, remanded in its entirety a removed action brought by a Wisconsin resident against a Mississippi state agency and a corporation that had constructed the bridge where the plaintiff had been injured. The court of appeals held that the corporation's "motion for removal" should not have been granted, 769 F.2d at 1087, and the Seventh Circuit cited that decision in support of the proposition that a removed case must be remanded in its entirety if some of its claims would be jurisdictionally barred from federal court. (App. 5)

In *Henry*, the court found that the Eleventh Amendment "did not divest the district court of subject matter jurisdiction over the plaintiff's individual capacity claim," 922 F.2d at 338, citing this Court's recognition of the "atypical jurisdictional bar of the eleventh amendment,"

which "concerns individual claims, not entire cases." *Id.* The Sixth Circuit rejected any contrary conclusion of *McKay* as "fundamentally incompatible" with this Court's decisions. 922 F.2d at 339.

The Seventh Circuit concluded, however, that the question before it

> concerns not the jurisdictional scope of the *Hans* doctrine or the Eleventh Amendment, but rather, the scope of a federal court's removal jurisdiction as allowed under § 1441(a). From our reading of the removal statute, we agree with *McKay*—if even one claim in an action is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court.

The lower courts are receiving mixed signals from the foregoing case law as to their duty to entertain or remand removed cases under these circumstances, and their decisions reflect the lack of a uniform direction on this single issue of law. *See Simmons v. California Dept. of Indus. Rel.*, 740 F. Supp. 781, 785 (E.D. Cal. 1990) (following *McKay* and remanding entire case); *Martinez v. Kansas State University*, 1991 U.S. Dist. LEXIS 2866, 1991 WL 33464, No. 89-4120-R (D. Kan. Feb. 6, 1991) (following *McKay*); *Green v. Johnson*, 1992 U.S. Dist. LEXIS 966, 1992 WL 21201, No. 1:91-CV-1004 (W.D. Mich. Jan. 16, 1992) (following *Henry*); *Texas Hospital Association v. National Heritage Insurance Co.*, 802 F. Supp. 1507 (W.D. Tex. 1992) (distinguishing *McKay* and concluding that remand of the entire case is not required even if some claims are barred by the Eleventh Amendment); *Brewer v. Purvis*, 816 F. Supp. 1560, 1571 (M.D. Ga. 1993) (rejecting *McKay* and following *Henry*); *Boyle v. City of*

Liberty, Mo., 833 F. Supp. 1436, 1453-54 (W.D. Mo. 1993) (following *Henry* and remanding only claims barred by the Eleventh Amendment); *Robinson v. California*, 836 F. Supp. 717 (N.D. Cal. 1993) (remanding entire case, following *Simmons*); *Cotton v. South Dakota*, 843 F. Supp. 564 (D.S.D. 1994) (following *Simmons*).

Because a decision of a district court to remand a case is not, ordinarily, reviewable on appeal, 28 U.S.C. § 1447(d), many cases presenting the issue now raised by petitioners will not proceed further in a federal forum. Therefore, the petitioners urge this Court to address this question at present and to establish a uniform rule governing a defendant's ability to remove a federal-question lawsuit to a federal court, even if some claims in that lawsuit are barred by the State's immunity under the Eleventh Amendment.

II.

THE SEVENTH CIRCUIT ERRED IN REJECTING THE SIXTH CIRCUIT'S DECISION IN *HENRY*, WHICH CORRECTLY INTERPRETED AND APPLIED THIS COURT'S ELEVENTH AMENDMENT JURISPRUDENCE TO ENABLE THE FEDERAL COURTS TO RETAIN AND DECIDE FEDERAL CLAIMS THAT ARE NOT BARRED BY A STATE'S SOVEREIGN IMMUNITY.

Nothing in the Seventh Circuit's opinion satisfactorily explains why the identification of a barred claim must defeat removal jurisdiction over an "action." In construing the scope of 28 U.S.C. § 1441(a), the court held that the statutory reference to "any civil action . . . of which the district courts . . . have original jurisdiction" had to be understood, in effect, as an "all or nothing" mandate, under which removal jurisdiction would be defeated by the presence of any claim that the federal courts could not decide. Notwithstanding the court's belief that it was merely implementing the "plain meaning" of the removal

statute, its view of removal jurisdiction does not provide the best analysis of the scope of that jurisdiction.

The petitioners removed this case from the state court on the basis of its presentation of questions arising under the Constitution of the United States. *See* 28 U.S.C. § 1331. The essential questions raised—the constitutionality of Illinois' administration of its Community Care Program—are within the power of the federal court to decide and are amenable to resolution in federal court in connection with the request for prospective injunctive relief. The presence of these federal questions qualifies this case for removal, under the "plain meaning" of Sections 1331 and 1441, read together, even if Illinois' sovereign immunity will bar the court's exercise of jurisdiction over certain claims. The better reasoned case law supports this result.

The Seventh Circuit bolstered its conclusion with reference to *McKay v. Boyd Construction Co., Inc.*, 769 F.2d 1084 (5th Cir. 1985), but its reliance on that decision was misplaced. It incorrectly read the Fifth Circuit's statement that removal "should not have been granted in the first place" as a conclusion based on sovereign immunity grounds. App. 5, *citing McKay* at 1087. In fact, *McKay*'s statement is explained in the court's next sentence, where it finds that diversity jurisdiction, the basis for removal, was flawed, but that this defect had been waived by the plaintiff's failure to raise it. *Id.*

The Fifth Circuit did go on to hold that the presence of the state agency defendant nonetheless required remand, but its conclusion does not fairly support a blanket refusal to entertain claims that are within a federal court's jurisdiction. Rather, the *McKay* court ruled on the basis of its recognition that the plaintiff's claim in that case alleged a cause of action jointly against a state defendant and a private entity, such that the claim could not be re-

solved without the presence of both defendants. *Id.* Its decision has, however, been widely cited in support of holdings that remand of an entire case is required whenever a claim within that case is barred by sovereign immunity. *See* Reason for Granting Writ I, *supra. But see Texas Hospital Association v. National Heritage Insurance Co.*, 802 F. Supp. 1507, 1513-15 (W.D. Tex. 1992), distinguishing *McKay* for the reasons described above.

In contrast to the meager Eleventh Amendment analysis in *McKay*, the Sixth Circuit carefully analyzed the jurisdictional issue in terms of this Court's continuing illumination of the scope and effects of a state's immunity from suit in federal court. Recognizing that this Court's decisions in *Alabama v. Pugh*, 438 U.S. 781 (1978), and *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), teach that a federal court indeed has original jurisdiction, in a case first filed in that forum, to decide claims unaffected by the Eleventh Amendment, the Sixth Circuit reasoned that the presence of non-jurisdictional claims would not defeat the federal court's jurisdiction over a similar action removed from the state court. *Henry v. Metropolitan Sewer District*, 922 F.2d 332, 338-39 (6th Cir. 1990). The *Henry* court reviewed the "uncommon aspect[s] of the eleventh amendment's jurisdictional bar," 922 F.2d at 337, and concluded that proper application of the amendment in a removed action required the court to evaluate each claim and to retain those not barred by sovereign immunity. Any claim that could not be resolved in a federal forum would be remanded.*

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* That a "case" or an "action" may consist of some claims that are amenable to federal adjudication, along with some claims that are not, is a recognized aspect of removal jurisdiction, at least where the question is whether the "case" must be remanded pur-

(Footnote continued on following page)

Implicit in *Henry*, but lacking in *McKay*, is a recognition of the necessary distinction that exists "between the absence of subject matter jurisdiction and a bar to the exercise of such jurisdiction." Note, *Removal and the Eleventh Amendment: The Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 Mich. L. Rev. 683, 706 (1993). Because the bar of sovereign immunity must be determined on a claim-by-claim basis, by examining not only the pleadings but any evidence of waiver by the state or abrogation by Congress, the state's immunity should not be held to prevent subject matter jurisdiction from attaching generally to a removed case that presents federal questions. Consequently, a federal court may decide those claims that are not barred.

The Seventh Circuit did not recognize such a distinction, on the basis of its prior ruling that a state's sovereign immunity limits the original jurisdiction of the federal courts, App. 5, *citing Crosetto v. State Bar of Wisconsin*, 12 F.3d 1369 (7th Cir. 1933). To the extent that identification of the scope of removal jurisdiction may hinge on the jurisdictional (as opposed to the common law) underpinnings of the immunity doctrine, as the Seventh Circuit has concluded it must, even that court has recently acknowledged the "lively debate" as to this issue, going so far as to marshal numerous reasons "in favor of the view that sovereign immunity, at least in cases brought by citizens against

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* *continued*

suant to 28 U.S.C. § 1447(c). Quite recently, in *Smith v. Wisconsin Department of Agriculture, Trade & Consumer Protection*, 23 F.3d 1134, 1140 (7th Cir. 1994), a case that was removed to federal court by a federal third-party defendant, the Seventh Circuit did not hesitate to remand to the state court a claim barred by sovereign immunity, while it retained and addressed other federal claims on the merits.

their own state, is better understood as a common law immunity than as a constitutional bar to jurisdiction." *Smith v. Wisconsin Department of Agriculture, Trade & Consumer Protection*, 23 F.3d 1134, 1140 (7th Cir. 1994).

The conflicting decisions engendered by this debate will only be resolved by a decision from this Court. Petitioners respectfully suggest, therefore, that their petition for a writ of certiorari should be granted.

CONCLUSION

For these reasons, the Director of the Illinois Department of Public Aid and the Director of the Illinois Department on Aging respectfully ask this Court to issue a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1099

FRANCES J., ET AL.,

Plaintiffs-Appellants,

v.

ROBERT WRIGHT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 519—**Charles P. Kocoras**, *Judge.*

ARGUED NOVEMBER 9, 1993—DECIDED MARCH 21, 1994

Before GIBSON,* CUMMINGS, and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* In this case Frances J. and Willa B. represent a class of mentally impaired adults over the age of 60 who have been or will be adjudicated disabled in the probate court of Cook County. On the plaintiffs' behalf, the Cook County Public Guardian filed suit, in state court, against two state officers in their official capacity ("Defendants"), alleging that they violated the plaintiffs' constitutional rights and misapplied state law. Defendants removed the case to federal court and subsequently moved

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* The Honorable Floyd R. Gibson, of the Eighth Circuit, sitting by designation.

to dismiss the plaintiffs' complaint. The district court granted Defendant's motion. Plaintiffs here appeal. Because the federal courts lack subject matter jurisdiction over this case, we vacate the judgment of the district court and remand this case with the instructions that the district court remand it back to the state courts.

I. Background

The named plaintiffs, Frances J. and Willa B., represent a class of elderly persons, most of whom suffer from Alzheimer, dementia or organic brain syndrome dysfunctions. At the time this suit was filed, Frances, at 75 years old, suffered from an organic brain syndrome dysfunction, while Willa, at 100, suffered from dementia of the Alzheimer type. Both are so severely disabled that the probate court appointed Patrick T. Murphy, the Cook County Public Guardian ("Guardian"), to direct their legal affairs. Defendants, Phil Bradley as the director of Illinois Department of Public Aid ("IDPA"), and Nancy Nelson as the acting director of the Illinois Department of Aging ("IDOA"), were sued in their official capacities only. Since the filing of this suit both Mr. Bradley and Ms. Nelson have been succeeded in their official duties by Robert Wright and Maralee Lindley respectively, and thus, pursuant to F.R.A.P. 43(c), Mr. Wright and Ms. Lindley have been substituted in the caption.

On the plaintiffs' behalf, the Guardian is attempting to obtain certain home health-care benefits for the plaintiffs that are provided by the state though IDOA.[1] In Illinois, the IDOA administers these health-care benefits through its Community Care Program ("Program"). As part of the Program, the IDOA has established the "Determination of Needs Analysis" ("DONA") test to assess the requisite level of home health-care services needed by an applicant. Depending on an applicant's DONA score, the state

[1] These benefits would permit Plaintiffs to receive their health care in their homes instead of in a institutional nursing facility.

will reimburse the Guardian for the allowed level of home health-care services. In this case, after the IDOA found the plaintiffs eligible for less than the maximum number of Program benefit dollars,[2] the Guardian filed suit in state court for damages, a declaratory judgment, and injunctive relief. In their state-court complaint, the plaintiffs alleged violations of substantive due process, procedural due process and equal protection rights, along with violations of the Rehabilitation Act of 1973. Defendants removed the case to federal court, where the district court dismissed the suit for failure to state a claim. Here, the plaintiffs have appealed. We do not reach the merits of the plaintiffs' contentions because this case is beyond the removal jurisdiction of the federal courts. Accordingly, we must vacate the district court's judgment and remand this suit with instructions to remand it to state court.

II. Analysis

The procedural path of this case highlights a peculiar sequence of decisions by Defendants. Initially this case was filed by the plaintiffs in the state courts of general jurisdiction. But Defendants, after removing this case to federal court on their own motion, now argue that this same federal forum lacks any subject matter jurisdiction, by the *Hans* doctrine,[3] to hear all but the prospective

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[2] Frances, with a DONA score of 71/100, qualified for seven hours of home health-care services per day, for a monthly total of $919.00 out of a possible $1,445.00. Similarly, Willa, with a DONA score of 71/100, qualified for five and a half hours of home care per day, or $838.00 out of the $1,445.00 possible per month. We are uncertain why Frances and Willa, both with a DONA score of 71/100, received unequal monthly benefits. However, since our resolution of this case does not depend on such treatment, we note this oddity without further comment.

[3] *Hans v. Louisiana*, 134 U.S. 1, 15 (1890); *see also Crosetto v. State Bar of Wisconsin*, 12 F.3d 1369, 1400 n.5 & n.6, (7th Cir. 1993) (discussing the interplay between the *Hans* doctrine and the Eleventh Amendment, in understanding the judicial power of the Article III courts, an initial matter, did not include the domain of cases between a citizen and his home state).

claims of this case. We are curious why Defendants would engage in such a paradoxical jurisdictional maneuver, unless they merely had hoped to split the prospective relief claims from those that are retrospective in nature. Whatever their reason, stratagem, or lack thereof, for our part we can only send this whole matter back from whence it came. Under the federal removal statute, this case should not have been removed without Defendants first producing an authoritative waiver of the state's sovereign immunity.

A. Removal

The linchpin of this court's jurisdiction is the case's removal pursuant to 28 U.S.C. § 1441(a).[4] The text of § 1441(a) specifies when a federal court may hear a case removed from state court. Notably, the language of this statute only authorizes the removal of *actions* that are within the original jurisdiction of the federal courts:

> Except as otherwise expressly provided by Act of Congress, any civil *action* brought in a State court of which the district courts of the United States have *original jurisdiction*, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (1948) (our emphasis). Thus, federal courts are straightaway restricted from removing actions

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[4] We have considered whether § 1441(c) could have alternatively stated authority for the removal of this case to federal court. We believe that the language of § 1441(c), by providing that "the entire case may be removed and the district court may determine *all* issues therein," 28 U.S.C. § 1441(c) (emphasis supplied), renders this statue inapplicable to the case at bar. Because the *Hans* doctrine bars a federal court from hearing claims against a citizen's home state in federal court, and, short of that sovereign's consent, the district court may not thus determine "all issues therein," this section seems incompatible with a case of this sort.

where the action could not have been originally filed in federal court. *See Metcalf v. Watertown*, 128 U.S. 586, 589 (1888). As we have opined recently in *Crosetto*, a state's sovereign immunity, whether rooted in the *Hans* doctrine or the Eleventh Amendment, limits the *original* subject matter jurisdiction of the federal courts. *See generally Crosetto*, 12 F.3d at 1400 ("In developing the *Hans* doctrine, the Eleventh Amendment has served as a historical framework for the Supreme Court's teaching that the Constitution never granted federal courts any judicial power over suits by a citizen against his own state.") (footnote omitted). By the plain meaning of § 1441(a), an action that contains claims barred by sovereign immunity, cannot, in whole or in part, be removed from the state courts to a federal forum because it is not an action within the original jurisdiction of the district courts.

We are not alone in our reading of § 1441(a). *See McKay v. Boyd*, 769 F.2d 1084, 1086-87 (5th Cir. 1985). In *McKay*, the Fifth Circuit faced circumstances strikingly similar to those here before our court. Mr. McKay, an adjudicated incompetent, through his guardian, sued the state of Mississippi among other defendants. The defendants successfully removed the entire case from state to federal court where the district court entered summary judgement in their favor. On appeal the Fifth Circuit vacated that judgment and remanded the entire case to the state court. The court reasoned that since some claims within Mr. McKay's original state action would be jurisdictionally barred from federal court, the plain language of § 1441(a), which requires the removing court to have jurisdiction over the entire action as if it were originally filed in that court, did not permit removal. The court concluded that "[the defendant's] motion for removal should not have been granted in the first place" without the defendant first obtaining an authoritative waiver of the state's sovereign immunity. *Id.* at 1087. Since *McKay*, three district courts in the Ninth Circuit have followed its reasoning to remand similarly removed sovereign-immunity cases, in their entirety, to state courts. In each of these cases the

action contained at least one claim that would be barred by sovereign immunity. *See Simmons v. State of California*, 740 F. Supp. 781, 785 (E.D.Cal. 1990); *Kelly v. California*, 687 F. Supp. 1494 (D. Nev. 1988), *affd.*, 880 F.2d 416 (9th Cir. 1989); *Stephans v. State of Nevada*, 685 F. Supp. 217, 220 (D.Nev. 1988).

In reaching our decision, we disagree, as some have asserted, that *McKay* and similar decisions must erroneously read *Hans* to bar federal jurisdiction over actions rather than single claims. *See Henry v. Metropolitan Sewer District*, 922 F.2d 332, 339 (6th Cir. 1990) (chiding *McKay*); *see also Brewer v. Purvis*, 816 F. Supp. 1561, 1570 (M.D. Ga. 1993).[5] We agree such a reading of *Hans* would contravene *Pennhurst*, a case plainly teaching that *Hans* only bars claims and not entire cases from federal court. *See Henry*, 922 F.2d at 337, *citing Pennhurst v. Halderman*, 465 U.S 89, 98 (1984) ("A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment."). The supposed criticism, such as raised in *Henry*, misses the mark. The question here, as in *McKay*, concerns not the jurisdictional scope of the *Hans* doctrine or the Eleventh Amendment, but rather, the scope of a federal court's removal jurisdiction as allowed under § 1441(a). From our reading of the removal statute, we agree with *McKay*—if even one claim in an action lacks federal jurisdiction as an original matter, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court.

We note that while our holding today is compelled by the text of § 1441(a), it is not without policy support. As the Supreme Court has taught from early in this Nation's history—state courts are competent and capable to decide those federal questions that, as under § 1441(a), would not

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[5] For a analysis of this case law, which we found unpersuasive, *see* Mitchell N. Berman, Note, *Removal and the Eleventh Amendment: the Case for District Court Remand Discretion to Avoid a Bifurcated Suit*, 92 Mich L. Rev. 3 (1993).

be removable to a federal forum. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Since the Constitution's framers specifically chose to make the creations of lower federal courts optional, *see* U.S. Const. Art. III, had Congress decided not to exercise that option, state courts would necessarily act as the initial forum for the adjudication of nearly all federal questions. Today, as a general matter, state courts still have jurisdiction concurrent with that of lower federal courts to hear suits arising directly under federal law. *See Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). Since state courts have the power to adjudicate such federal questions, preventing a defendant from splitting a single case into two, one state and the other federal, furthers judicial economy. In any event, whatever the policy behind Congresses' language in § 1441(a), when applying a statute "we assume that the statute's operative words carry the plain meaning within their context." *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679, 683 (7th Cir. 1993); *see also Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 ("When the words of a statute are unambiguous, then, this first cannon is also the last: 'judicial inquiry is complete.' "). As we read § 1441(a), a defendant cannot remove an action if it contains any claim that is bared by a state's sovereign immunity.

B. Sovereign Immunity

Having concluded that § 1441(a) bars the removal of an action if it contains claims that would infringe a state's sovereign immunity, we must examine the claims here. Plaintiffs brought this suit against the Director of the IDPA and the IDOA in their official capacities requesting the district court to order the IDOA to immediately reimburse the Office of the Public Guardian for all public funds the Guardian has expended on Frances and Willa for which the IDOA should have paid. To the extent the plaintiffs' claims sought retrospective relief to be paid from the state's treasury, they are barred under the *Hans* doctrine, unless the state has explicitly consented to suit in federal court.

This constitutional bar to federal jurisdiction applies to suits against any state, *Hans*, 134 U.S. at 15, its departments or agencies, *Alabama v. Pugh*, 438 U.S. 781 (1979), and its officials when "the state is the real substantial party in interest," *Ford v. Department of Treasury*, 323 U.S. 459, 464 (1945). For state officials, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). A decree operates against the state if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted); *see also Crosetto*, 12 F.3d at 1402; *Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 669 (7th Cir.), *cert. denied*, 113 S. Ct. 491 (1992). As a general rule, suits brought against state officials in their official capacities are suits against the state. *See Hafer v. Melo*, 112 S. Ct. 358, 361-62 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). "[A] suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst*, 465 U.S. at 102, *citing Corry v. White*, 457 U.S. 85, 91 (1982).

An exception to the general rule of *Hans* has been recognized where an official-capacity suit challenges the legality of an official's conduct under the Constitution or federal law. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). The theory in such cases is that a state cannot authorize actions by state officials that are contrary to the "the supreme authority of the United States." *Id.* at 160. When an official undertakes such an action, he is fictionally "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.* However, a federal court may only award injunctive relief that governs the official's future conduct. *Green v. Mansour*, 474 U.S. 64, 74 (1985). Thus, without waiver, official capacity suits for monetary or other

retrospective relief still remain outside federal jurisdiction. *Green*, 474 U.S. at 74; *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974); *Crosetto*, 12 F.3d at 1402; *MSA Realty Corp. v. State of Illinois*, 990 F.2d 288, 292-94, 295 (7th Cir. 1993). The plaintiffs' request for reimbursement from the IDOA is clearly a claim seeking retrospective relief. Therefore, it is beyond the ordinary scope of federal jurisdiction and, under our reading of § 1441(a), its removal is improper without Defendants first obtaining the state's consent to be sued for retrospective relief in federal court. *Kroll v. Board of Trustees*, 934 F.2d 904, 909-10, (7th Cir. 1991).

As a general matter Illinois has consented to such suits in its own state courts, in a manner prescribed by the General Assembly. Ill. Const. art. 13, § 4 (1971); *see also Osteen v. Henley*, 13 F.3d 221, 223 (7th Cir. 1993). However, a state may consent to certain suits in its own courts without waiving its constitutional immunity from such suits in the federal forum. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985); *Osteen*, 13 F.3d at 223-24; *Kroll*, 934 F.2d at 907-10. The Supreme Court has stated that a state's consent to claims in the federal courts must be "stated by the most express language or by such overwhelming implication from the text as to leave no room for any other reasonable construction." *See Kroll*, 934 F.2d at 909, *citing Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S.Ct. 1868, 1873 (1990), *citing Atascadero v. State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). According to the Court, even a provision of California's Constitution that read "[s]uits may be brought against the State in such manner and in such courts as shall be directed by law," did not waive the State's *Hans* immunity. *Atascadero*, 473 U.S. at 241, *citing* Cal. Const. art. III, § 5. Thus, here neither article XIII, section 4 of the Illinois Constitution, nor the mere fact that Defendants removed the case to federal court can be construed as the kind of explicit waiver of federal sovereign immunity required by the Court. While Illinois may well have waived retrospective-claims against itself in its own courts, no evidence exists here that it in any way consented to suits

over such claims in federal court. Therefore, without Illinois' consent, the district court lacked subject matter jurisdiction, under *Hans*, to hear the retrospective claims of this case.

III. Conclusion

Having determined that the plaintiffs' action contained claims that are outside the original jurisdiction of the federal courts, under § 1441(a), their action should not have been removed from state to federal court. Without proper removal the district court lacked jurisdiction. Therefore, we must vacate its judgment and remand this case with the instruction that it be remanded to state court.

VACATED and REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 3, 1994

HON. FLOYD R. GIBSON, Circuit Judge*
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge

FRANCES J. and WILLA B., by their Guardian, PATRICK T. MURPHY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

No. 93-1099 v.

ROBERT WRIGHT, Director, Illinois Department of Public Aid and NANCY NELSON, Acting Director, Illinois Department of Aging,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 5190—Charles P. Kocoras, Judge.

ORDER

The opinion issued in the above-entitled case on March 21, 1994 is hereby amended as follows:

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* The Honorable Floyd R. Gibson, of the Eighth Circuit, sitting by designation.

On Page 6, first full paragraph, line 20, please delete the following:

> lacks federal jurisdiction as an original matter

Please replace this deletion on Page 6 with the following addition:

> is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (*see* 28 U.S.C. § 1367) jurisdiction of the federal courts,

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 3, 1994

HON. FLOYD R. GIBSON, Circuit Judge*
HON. WALTER J. CUMMINGS, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge

FRANCES J. and WILLA B., by their Guardian, PATRICK T. MURPHY, on their own behalf and on behalf of all others similarly situated,

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Defendants-Appellees.

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No. 92 C 5190—Charles P. Kocoras, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled

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* The Honorable Floyd R. Gibson, of the Eighth Circuit, sitting by designation.

cause on April 4, 1994 by defendants-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 92 C 5190 Date: December 14, 1992

Name of Assigned Judge: Charles P. Kocoras

Case Title: Frances J. et al -v- Bradley et al

* * * * * *

DOCKET ENTRY:

* * * * * *

(10) ☒ [Other docket entry] ENTER MEMORANDUM OPINION: Defendants' motions (Docs 10-1 and 14-1) to dismiss are granted. All other pending motions, if any, are hereby moot. So ordered.

(11) ☒ For further detail see ☒ order attached to the original minute order form.]

* * * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FRANCES J. and WILLA B., by their Guardian, PATRICK T. MURPHY, on their behalf and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	
	)	92 C 5190
PHILIP BRADLEY, DIRECTOR, ILLINOIS DEPARTMENT OF PUBLIC AID and NANCY NELSON, ACTING DIRECTOR, ILLINOIS DEPARTMENT OF AGING,	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

The plaintiffs Frances J. and Willa B. represent a class of elderly citizens in Illinois who are allegedly being deprived of home health care benefits by the defendants, the Illinois Department of Public Aid ("DPA") and the Illinois Department of Aging ("DOA"). Plaintiffs, represented by a state-appointed public guardian, seek injunctive relief prohibiting the defendants from further depriving them of deserved benefits. The defendants deny that their method of dispersing benefits violates the law and request that this Court dismiss plaintiffs' action pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). We

find that plaintiffs fail to successfully allege that the defendants are in violation of the law, and we grant the defendants' motion accordingly.

BACKGROUND

Title XIX of the Social Security Act, 42 U.S.C. 1396n(d) (West 1992), directs the United States Department of Health and Human Services ("DHHS") to implement programs for the elderly designed to prevent their unnecessary institutionalization in nursing homes. The statute provides that, in return for federal funds, participating states must offer in-home health services to the functionally disabled elderly to prevent institutionalization in cases where the cost of the in-home services would be lower than the cost of nursing home care. The State of Illinois chose to participate in the federal program and thus entered into a waiver agreement with the DHHS under which the DPA was to provide in-home health services to the elderly disabled in Illinois in return for federal reimbursement.

The Illinois DPA established the Illinois Community Care Program (the "CCP") in 1978. The DOA was subsequently designated as the administering agency for the CCP. CCP services are intended for elderly persons age sixty and over who demonstrate a significant degree of impairment, whether physical or mental, and who lack resources or support to offset the impairment. The DOA, as the administering agency, bears the responsibility of determining which elderly individuals qualify as disabled and are therefore eligible for CCP benefits.

To ascertain individual eligibility, the DOA uses an evaluation device entitled the Determination of Need instrument the ("DON instrument"). The DON instrument consists of two examination components, a cognitive-status

examination, and a functional-status examination. The cognitive-status examination utilizes the Folstein Mini-mental Status Examination (the "MMSE"), a tool which measures mental competence. The functional-status examination, on the other hand, measures functional competence. This examination analyzes an elderly individual's capacity to perform fifteen "Activities of Daily Living." An applicant may receive a possible score of 100 points on these tests. The higher the score, the greater the benefit level received. Based on the applicant's overall score on the DON, she is deemed eligible for services costing anywhere between $1.00 to $1,445.00 per month.

Reassessment with the DON instrument takes place at periodic intervals or upon the request of the beneficiary or her guardian. In addition, all applicants of the CCP possess a right to appeal certain decisions, actions, or inactions made regarding their benefits. The actions that may be appealed include, *inter alia*, the following: a refusal to accept an application, a decision to deny an application, and a decision to reduce or terminate benefits. When the DOA receives an appeal notice, it conducts an informal review to determine facts, which may include a face-to-face meeting with the beneficiary, and then if the appeal is denied, the beneficiary may receive a formal hearing before a hearing officer. The hearing officer certifies the entire record of the hearing to the Director of the DOA and recommends a decision on each issue in the hearing. The hearing officer does not render a final decision relevant to any issue in the hearing. The Director of the DOA issues the final decision pursuant to DOA rules.

The plaintiffs in this matter are a class of mentally disabled elderly people who have been or will be adjudicated disabled and placed under the guardianship of the Cook

County Public Guardian. They contend that the evaluation process used by the DOA fails to adequately assess elderly individuals' eligibility for in-home health services. First, plaintiffs point out that the DON instrument is the only method employed by the DOA to determine whether an individual should receive CCP benefits. According to the plaintiffs, there is no procedure that provides for the presentation of evidence that falls outside the parameters of the DON instrument's scope of inquiry. In addition to the DON instrument's limited scope of inquiry, plaintiffs claim that this tool for measuring disability possesses internal shortcomings that preclude it from accurately assessing the mental disabilities of applicants for CCP benefits. Finally, plaintiffs argue that the DON instrument is being misapplied by employees of the DOA who are not qualified to judge mental disabilities, and who "routinely ignore the (DOA's) own regulations" when administering the test.[1] As a result of the shortcomings and misapplica-

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[1] The two named plaintiffs, Frances J. and Willa B., allege that their situations illustrate the inaccuracy and inadequacy of the DON instrument. Frances J., 75, suffers from organic brain syndrome and has been determined disabled by the courts, yet has been denied the maximum benefits under the CCP. She is unable to walk, to perform any household duties, to use the commode by herself, or to prepare food for herself. She also has memory problems and her mental status varies. When her CCP benefits were reduced, she requested a DON test and scored 71 out of the 100 possible points. She received 0 points on the mental health test, indicating she was in perfect mental health, even though the caseworker that administered the test acknowledged that Frances J. could not be left alone due to her inability to know to evacuate in an emergency. Her benefit level ultimately increased due to her reassessment, but fell approximately $500 below the maximum level possible.

Willa B., 100, suffers from dementia of the Alzheimer type. She too has been adjudicated disabled by the court and has been denied maximum benefits. Willa has several health problems and is ex-

(Footnote continued on following page)

tions of the DON instrument, the plaintiffs must submit to unnecessary institutionalization, find private funds that are seldom available, or they must prevail on family and friends, who may be nonexistent or themselves destitute, to provide the services denied by the DOA.

Plaintiffs contend that the defendants' conduct in depriving them of maximum benefits is in violation of several laws including the following: 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 1396n(d); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794; and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Based on these alleged violations, plaintiffs request immediate injunctive relief ordering the defendants to provide them with the maximum hours of home health care services allowed under the CCP. Defendants argue that plaintiffs have stated no valid claim for relief under the law and have moved this Court to dismiss the plaintiffs' case. Because we agree with the defendants that the plaintiffs cannot prevail in this case on the merits, we dismiss their complaint for injunctive relief.

We shall address the motion in this order of analysis. First, we shall examine the appropriate legal standard from which to judge defendants' motion. Second, we shall determine whether to retain plaintiffs' case in this forum or whether to require them to exhaust available administrative remedies first. We shall then proceed to discuss each of the plaintiffs' claims for relief.

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[1] *continued*
tremely forgetful and hard of hearing. Willa does not take her medications consistently and accurately. Furthermore, she frequently eats roach-infested food unless she is monitored. Willa too received a score of 71 on the DON. She was not given the maximum points for daily living activities including "being alone."

LEGAL STANDARD

Defendants request this Court to dismiss plaintiffs' case pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). A defendant must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must construe the complaint's allegations in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 235 (1974). The allegations of a complaint should be construed liberally and a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conly v. Gibson*, 355 U.S. 41, 45-46 (1957). *See also Doe on Behalf of Doe v. St. Joseph's Hospital*, 788 F.2d 411 (7th Cir. 1986). A complaint will not be dismissed on mere vagueness. *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985). We address defendants' motion keeping these principles in mind.

DISCUSSION OF THE ISSUES

A. *Exhaustion of Administrative Remedies*

A threshold question is raised whether this Court should dismiss this action for the plaintiffs' failure to exhaust their administrative remedies. It is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). This rule, however, is subject to exceptions applied in the dis-

cretion of the court. Under one such exception, exhaustion of administrative remedies is not required if exhaustion would be futile because adequate remedies are not reasonably available to the party seeking relief. *Continental Can Co. v. Marshall*, 603 F.2d 590, 597 (7th Cir. 1979); *Sanders v. City of Springfield*, 474 N.E.2d 438 (Ill. App. Ct. 4th Dist. 1985) (citing, *Dock Club, Inc. v. Illinois Liquor Control Com.*, 404 N.E.2d 1050 (Ill. App. Ct. 4th Dist. 1980)).

Plaintiffs argue that pursuit of administrative remedies would be futile and that requiring them to exhaust such remedies is unnecessary. We agree with plaintiffs' contention. In their complaint, the plaintiffs allege that the administrative process established in the regulations is inadequate because it fails to take into account evidence of court orders regarding disability and other significant valuative information not ascertainable through the DON instrument. State administrative hearing officers lack the authority to address the plaintiffs' arguments concerning the adequacy of the process established by the regulations. Because we believe exhaustion of administrative remedies would therefore be futile and would cause unnecessary delay, we shall proceed to analyze the merits of defendants' motion to dismiss.

B. *The Social Security Act, Section 1396n(d)*

Under certain provisions of the federal Social Security Act, federal financial assistance is authorized for states participating in the Medicaid Program, a program to fund costs of medical treatment for needy persons. The provisions of the statute allow the Secretary of the DHHS to waive certain uniform requirements of the Social Security Act in order to allow states to target certain groups of citizens with specific needs. This case involves 42

U.S.C.A. § 1396n(d) ("section 1396n(d)"), which permits participating states, with the approval of the Secretary of the DHHS, to provide home and community-based care to certain elderly individuals who otherwise would be required to live in a skilled nursing facility.

Plaintiffs, representing the group of individuals targeted by section 1396n(d), contend that the defendants' denial of benefits to them constitutes a violation of the terms of section 1396n(d) and 42 U.S.C. § 1983 ("section 1983"). *See Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding that plaintiffs may sue under section 1983 to obtain a remedy for violations of federal statutes). Plaintiffs point to two clauses in the statute that provide them an enforceable right. First, they contend that section 1396n(d)(1) assumes that the State will make "a determination that but for the provision of such [home health care] services the individuals would be likely to require the level of care provided in a skilled nursing facility or intermediate care facility the cost of which could be reimbursed under the State plan . . . ." Moreover, they claim that under section 1396n(d)(2)(B),[2] the defendants are bound to provide

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[2] Section 1396n(d) provides in pertinent part:

> (2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that—
>
> > (A) necessary safeguards (including adequate standards for provider participation) have been taken to protect the health and welfare of individuals provided services under the waiver and to assure financial accountability for funds expended with respect to such services;
> >
> > (B) with respect to individuals 65 years of age or older who—
> >
> > > (i) are entitled to medical assistance for skilled or intermediate care facility services under the State plan,

(Footnote continued on following page)

for an evaluation of the need for skilled nursing or intermediate care facility services.[3]

We find that the provisions of section 1396n(d) upon which plaintiffs base their claim do not confer a right enforceable through section 1983. We rely on two recent Supreme Court and Seventh Circuit cases that are dispositive in this matter. In *Suter v. Artist M.*, 112 S.Ct. 1360 (1992), a class of plaintiffs sued the Illinois Department of Children and Family Services and two of its administrators, alleging that the defendants violated a provision of the Adoption Assistance and Child Welfare Act of 1980 ("the Adoption Act"). The Adoption Act provides that for a state to receive payment from the federal government, it must have a plan approved by the Secretary of Health and Human Services, and that plan must provide, among other things, that "in each case, reasonable efforts will be made" to prevent the removal of a child from his home

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[2] *continued*

(ii) may require such services, and

(iii) may be eligible for such home or community-based services under such waiver,

the State will provide for an evaluation of the need for such skilled nursing facility or intermediate care facility services.

[3] Notably, plaintiffs do not argue that section 1396n(d)(2)(A)'s terms create an enforceable right. This provision requires the state to provide assurances to the Secretary that "necessary safeguards" that include "adequate standards for provider participation" have been taken to "protect the health and welfare of individuals provided services under the waiver . . . ." Because plaintiff does not argue this language creates an enforceable right, we need not address it. However, we note that under a clear-meaning interpretation of this provision, it seems to apply to measures that a state must take in order to protect individuals who have been recognized eligible and who are receiving benefits under the program, rather than applying to measures a state must take in the evaluation process.

or to make it possible for a removed child to return to his home. *Id.* at 1364 (quoting, 42 U.S.C. § 671(a)(15)). The Supreme Court held that this Adoption Act provision did not create a right enforceable under section 1983. The Court said that the provision required only that the state *adopt a plan* providing that the state will make "reasonable efforts" to prevent removing a child from his home or to make it possible to return a removed child to his home. 112 S.Ct. at 1367, 1369 (emphasis added). The Court pointed out that nothing in other provisions of the Adoption Act placed any other specific requirement on the states regarding the "reasonable efforts" provision. *Id.* at 1367-69.

The Seventh Circuit, in *Clifton v. Schafer*, 969 F.2d 278 (7th Cir. 1992), relied on *Artist M.* when it held that a plaintiff could not enforce a regulation implementing a statutory provision concerning the Aid to Families with Dependent Children program ("AFDC") under section 1983. The regulation provides that a state AFDC plan must not suspend or reduce benefits until a decision regarding those benefits is rendered after a hearing. In *Clifton*, the plaintiff alleged that his benefits had been reduced prior to such a decision. The court began its analysis by pointing out that the regulation in question was one of several items on a list of required contents for state AFDC plans. According to the *Clifton* court, the provision "in terms does not explicitly require continuing reimbursement pending a hearing; rather, like the statutory provision at issue in *Artist M.*, it requires only that the state adopt a plan that provides 'for a system of hearings under which' a recipient will continue to receive full benefits pending the outcome of a hearing." *Clifton*, 969 F.2d at 284. The court further suggested that if the regulation created any enforceable right, it was only the right

to insist that the state adopt a plan meeting the regulation's requirements. *Id.* at 284. Because the plaintiff in *Clifton* did not dispute that his state had established a system that provided benefits pending a hearing, the plaintiff possessed no enforceable right pursuant to section 1983.

Adopting the reasoning of *Artist M.* and *Clifton*, we conclude that the plaintiffs have failed to state a claim based on section 1396n(d) sufficient to defeat the defendants' motion to dismiss. The language employed by section 1396n(d) is straightforward in its requirements. The state must "provide an evaluation of the [individual's] need" for either skilled nursing facility services or for intermediate care facility services. The statute does not preface this requirement of an evaluation with qualifying words such as "adequate" or "reasonable." The state is merely required to adopt a plan in which an evaluation is performed. Although the plaintiffs state in a conclusory fashion that the state, presumably because of the extreme inadequacy of the DON instrument, fails to provide an evaluation, neither in their complaint nor in their briefs do the plaintiffs meaningfully argue that the DON instrument utterly fails to evaluate applicants' status. Beyond their conclusory remark, the plaintiffs base their complaint entirely on the inadequacy and failures of a process that the plaintiffs repeatedly accept as an "evaluation." For example, they claim that the "evaluation of need which supports the determination is faulty . . . ." In addition, they state that the "evaluation excludes consideration of the evidence supporting the adjudication of disability."[4] Because plain-

[4] More fully stated, plaintiffs argue that the defendants "effectively fail" to make the determination required by section 1396n(d)(1) because their determination is "incomplete and inaccurate." They

(Footnote continued on following page)

tiffs have failed to state a claim alleging the defendants' failure to evaluate, a claim which, according to the *Clifton* court, might justify our finding an enforceable right exists, but instead state a claim alleging only inadequate evaluation, plaintiffs do not allege a claim sufficient to support a cause of action under section 1396n(d).

Plaintiffs argue that *Wilder v. Virginia Hosp. Ass'n.*, 496 U.S. 498 (1990), dictates that we rule in their favor. We believe that *Wilder* is distinguishable. In *Wilder*, the Supreme Court considered the Boren Amendment to the Medicaid Act, which required states who desired federal funding to submit a plan that provided for reasonable and adequate rates for payments to health care providers. The Court held that the Boren Amendment required the states to adopt reasonable and adequate rates, and that this requirement conferred upon health care providers a right enforceable under section 1983. The Court emphasized that the statute and regulations "set forth in some detail the factors to be considered in determining the methods for calculating rates." *Wilder*, 496 U.S. at 519.

In *Artist M.*, the Court distinguished *Wilder* in concluding that the Adoption Act did not provide an enforceable right. The Court in *Artist M.* focused on the nebulous quality of the Adoption Act's requirement of "reasonable efforts," indicating that this requirement would vary from case to case. *Artist M.*, 112 S.Ct. at 1368. Additionally, the Court noted that neither the Adoption Act nor its regula-

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[4] *continued*
claim that the "evaluation of need which supports the determination is faulty" because it fails to include the "rebuttable presumption that the state court's adjudication of disability and appointment of a guardian establishes entitlement to the maximum level of home care services." In addition, the "evaluation excludes consideration of the evidence supporting the adjudication of disability."

tions gave content to the requirement by providing explicit detail. *Id.* Similar to the Adoption Act in *Artist M.*, section 1396n provides no details or guiding language for its requirement that the state perform a "determination" or an "evaluation" of the need for skilled nursing or intermediate care facility services. Rather than give the state explicit instructions on how to perform its evaluation, the statute provides that the Secretary shall monitor the implementation of the waivers "to assure that the requirements for such waiver are being met and shall, after notice and opportunity for a hearing, terminate any such waiver where he finds noncompliance has occurred." 42 U.S.C.A. § 1396n(f) (West 1992). Based on the foregoing, we reject plaintiffs' claim that *Wilder* is dispositive, and accordingly, grant defendants' motion to dismiss plaintiffs' cause of action based on section 1396n(d).

C. *Section 504 of the Rehabilitation Act*

A *prima facie* case of discrimination under section 504 of the Rehabilitation Act is made with a showing of these four elements: (1) the plaintiff is a handicapped individual; (2) the plaintiff is otherwise qualified to receive the benefit of the activity in question; (3) the plaintiff is excluded from the benefit solely because of the plaintiff's handicap; and (4) the program receives federal funding. 29 U.S.C.A. § 794 (West Supp. 1991); *Plummer v. Branstad*, 731 F.2d 574 (8th Cir. 1984).[5] The parties do not dispute that ele-

[5] 29 U.S.C.A. § 794(a) (West Supp. 1991) provides that "[n]o otherwise qualified individual with handicaps . . . shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . ." "Program or activity" includes the operations of any state agency that distributes benefits and receives federal financial assistance. 29 U.S.C.A. § 794(b).

ments one and four are met in this case. It is the remaining elements to which we now turn.

Plaintiffs argue that they possess a legitimate section 504 claim. They argue that because they have been adjudicated mentally handicapped by a court that they are "otherwise qualified" to receive the "full panoply" of benefits offered by the CCP program. They allege that they have been excluded from receiving the full extent of CCP benefits solely because their handicap cannot adequately be detected by the DON instrument. They suggest that the DOA should rely on court adjudication of disability in determining CCP eligibility. Such reliance on court findings would be a reasonable accommodation and would impose no undue hardship on the DOA. *See Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979) (noting that section 504 imposes no requirement to effect substantial modification of standards to accommodate a handicapped person); 45 C.F.R. § 84.12(a) (1991) (stating that section 504's ban on discrimination requires only that recipients of federal funding make reasonable accommodation to the handicapped, unless it would impose undue hardship).

By so arguing, plaintiffs ask this Court to stretch the reach of section 504 to interfere in a state agency's discretionary decisionmaking regarding the disbursement of limited funds. Plaintiffs do not allege that services that are being provided to non-handicapped citizens are being denied to citizens with handicaps. *P.C. v. McLaughlin*, 913 F.2d 1033 (2nd Cir. 1990) (stating that the " 'clearly established law' concerning § 504 indicates that its central purpose is to assure that handicapped individuals receive 'evenhanded treatment' in relation to the nonhandicapped"). Furthermore, they do not propose that the DOA is arbitrarily assuming they are unable to function in a

certain context because of their possession of a handicap. Instead, plaintiffs distinguish among gradations of disabilities and argue that the defendants are unreasonably discriminating in favor of one level of disability over another. In determining whether plaintiffs are "otherwise qualified" to receive CCP benefits, we decline to adopt the plaintiffs' substitute standards. Instead, we defer to the institutional judgment of the DOA in determining the appropriate level of benefits to be distributed in relation to the severity of an individual's handicap. *Dempsey v. Ladd*, 840 F.2d 638, 640 (9th Cir. 1987) ("[t]o determine the scope of the term 'otherwise qualified handicapped individual,' courts consider the eligibility requirements of the state program receiving federal funds"); *Doe v. New York University*, 666 F.2d 761, 776 (2d Cir. 1981) (holding that "considerable judicial deference must be paid to the evaluation made by the institution itself"). The "Rehabilitation Act forbids decisions based on stereotypes about a handicap, but it does not forbid decisions based on the actual attributes of the handicap." *Carter v. Casa Cent.*, 849 F.2d 1048, 1053 (7th Cir. 1988) (quoting, *Anderson v. University of Wisconsin*, 841 F.2d 737, 740 (7th Cir. 1988)). Both Frances J. and Willa B. receive benefits from the DOA. Although the plaintiffs may not be receiving the maximum benefits offered under the CCP, they are not being deprived of meaningful access to these benefits. They are not being absolutely excluded from the program, but are receiving differential benefits based on differences in their individual conditions. Hence, we conclude that plaintiffs have failed to state a claim under section 504 of the Rehabilitation Act. *See also Alexander v. Choate*, 469 U.S. 287, 303 (1985) (refusing to allow a claim under section 504 because the Medicaid Act, 42 U.S.C. § 1396a (a)(19), gives the states substantial discretion in defining the allocation of benefits).

D. *Procedural Due Process*

To establish that defendants have deprived them of their fourteenth amendment due process rights, the plaintiffs must first demonstrate that the defendants have deprived them of a protected property interest. Second, they must illustrate that interest was deprived without due process of law. Whether plaintiffs possess a property interest in the maximum benefits allowable under the CCP depends on if they are entitled to those benefits. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). An entitlement exists where the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing. *Cornelius v. La Croix*, 838 F.2d 207 (7th Cir. 1988). The CCP regulations at issue establish a framework of factual conditions whose purpose is to determine whether an applicant should be awarded benefits. Moreover, the DOA has recognized in its literature that the CCP is an entitlement program. Because we conclude that the CCP benefits are an entitlement, we now proceed to determine what process is due to the recipients.

Due process protects citizens from arbitrary treatment by their government. *Wolff v. McDonnell*, 418 U.S. 539 (1974). It ensures that citizens possess an opportunity to be heard in a meaningful time and a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970). In order to determine the constitutional adequacy of the administrative procedures employed by the DOA, we assess the following factors: the private interest that will be affected by the official acction; the risk of an erroneous deprivation of such interest through the procedures used; the probable value, if any, of additional or substitute procedural safeguards; and the state's interest, including the fiscal and administrative burdens that additional or substitute

procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Baja Contractors*, 830 F.2d at 679.

Balancing these factors, we conclude that the process established for determining CCP eligibility does not deny plaintiffs their constitutional rights. It is indisputable that the stakes for the plaintiffs are high, and that the risk of an erroneous deprivation could result in the plaintiffs' loss of their homes, their pets, and their personal property. However, we find that the procedural safeguards employed by the defendants provide sufficient notice and opportunity for the plaintiffs to be heard. We therefore discern no reason to interfere in the administrative process by adding the safeguards recommended by plaintiffs.

The regulations provide the plaintiffs with generous notice and time to be heard. When an applicant submits an application to the DOA, the applicant is informed in writing of the eligibility requirements under the CCP and of his right to appeal. Ill. Admin. Code tit. 89, § 240.510 (1991). Redeterminations of eligibility are available at the plaintiffs' or their guardians [sic] request. Ill. Admin. Code tit. 89, § 240.655. Any decision regarding eligibility is appealable through both informal and formal review. Under the regulations, plaintiffs are afforded an opportunity to submit any evidence, documentary or otherwise, in each phase of the appeal process to support their request for a certain level of services. *Id.* at § 240.450. The applicant is also provided continuances and accommodations in order to facilitate the appeal. *See, e.g.* Ill. Admin. Code tit. 89, §§ 240.410, 240.451, 240.455.

Plaintiffs vehemently argue that the process established by the defendants fails to provide them with a meaningful opportunity to be heard. They allege that it possesses several deficient characteristics. First, plaintiffs suggest

that the defendant's reliance on the DON instrument precludes them from presenting outside medical and psychiatric evidence in the evaluation process. Although we agree with the plaintiffs that depriving them of the opportunity to offer this type of evidence would constitute a deprivation of their rights, we cannot conclude that the defendants do exclude this evidence from their determination. Plaintiffs allege that the regulations governing the evaluation process exclude additional information, but we do not read the regulations in that manner. At the least, this extra information may be presented in the appeal process, which we have indicated above is constitutionally adequate. Ill. Admin. Code tit. 89, §§ 240.630; 240.450.

Plaintiffs further argue that a judicial determination of disability should automatically be equated with an award of maximum benefits for the individual who has been adjudicated disabled. We do not think this is required under the Fourteenth Amendment. The process utilized by the DOA in determining CCP eligibility focuses on the individual needs of an applicant, while at the same time recognizing that available funds for the program are limited. A standard measurement tool applied by case managers who have had similar training experience provides consistent measurements that can guarantee equitable distribution of limited funds. Awarding automatic maximum benefits for individuals who have been adjudicated disabled too handily disregards their differing mental and physical capacities.

Plaintiffs finally make several allegations regarding the inadequacy of the DON instrument and the inadequate way that it is applied. We conclude that the plaintiffs fail to illustrate that the DON instrument on its face and in its application violates the procedural due process rights of the applicants. Illinois has used the DON instrument

as a component of the assessment process since 1982. It has recently been revised upon the recommendation of researchers from the University of Illinois. Those researchers commended the MMSE portion of the DON, stating that the MMSE has had "widespread acceptance as one of the dominant mental status examinations . . . ." The DON is not an arbitrary method of determining disability and, thus, the defendants do not violate the constitution in using it.

Plaintiffs additionally complain that the case managers administering the DON instrument are not professionals, but are "marginally trained" to assess disability. Due to this lack of competence, plaintiffs allege in a conclusory fashion that the case managers routinely ignore the reality of an applicant's situation and therefore fail to appropriately score their disabilities. The case manager's alleged lack of training, when combined with all of the procedural safeguards required by the regulations, does not deprive the plaintiffs of due process. All Illinois case managers who administer the DON are provided training on Alzheimer's Disease and dementia on a regularly scheduled basis. Moreover, the training provided by the DOA includes the effect of mental impairment on activities of daily living. Case managers are also provided with manuals which address scoring and care plans for the mentally disabled. This training is adequate to satisfy due process requirements.

E. *Substantive Due Process*

Plaintiffs assert that as a result of their status as wards of the Public Guardian of Cook County, they are in the custody of the state. Although plaintiffs argue that they are "in custody," they assert that they are entitled to choose where and how to live and to not have their guar-

dian be precluded from arranging for them "appropriate living arrangements." Plaintiffs further allege that they possess a right to the least restrictive environment which will meet their individual needs.

"As a general matter, the State is under no constitutional duty to provide substantive services for those within its border." *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1987), *cert. denied*, 489 U.S. 1065 (1989) (citing, *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)). The state does, however, owe certain protections to those it takes into civil custody. *Youngberg*, 457 U.S. at 319-325. We conclude that plaintiffs fail to allege sufficient "custody" to implicate any substantive rights under the due process clause.[6] Plaintiffs are not institutionalized, nor has the state deliberately inflicted injury upon them or greatly increased their risk of danger while constricting their access to self-help. *Archie*, 847 F.2d at 1222-23 (analogizing that if the government hurls a person into a snake pit, it may not disclaim responsibility for his safety). The plaintiffs, either themselves or through their guardian, are not hindered from seeking other sources of aid beyond that offered by the DOA. Moreover, the individuals receiving benefits are not prevented from refusing to accept the

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[6] Because we hold that the plaintiffs fail to sufficiently allege that they are in custody, we need not address their substantive rights under the due process clause. We do note that the Supreme Court in *Youngberg v. Romeo* held that mentally retarded people who are involuntarily committed have constitutionally protected liberty rights, under the due process clause of the fourteenth amendment, to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training or habilitation as reasonably may be required by these interests. The rights recognized in *Youngberg*, however, did not include the right to live in the least restrictive environment possible. *Lelsz v. Kavanagh*, 807 F.2d 1243, 1249 n.8 (5th Cir. 1987).

benefits offered to them. *See Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283, 1285 (7th Cir. 1991) (claiming that unless any offer of subsidized services is to be treated the same as custody, the plaintiff must lose). In light of the precedent before us, we dismiss plaintiffs' claim alleging a substantive due process violation.

F. *Equal Protection Claim*

Plaintiffs allege that the class of individuals they represent, those elderly individuals whose mental impairment is not given appropriate weight by the DON instrument in the CCP evaluation process, are being denied equal protection of the laws under the Fourteenth Amendment. We disagree. The administrative regulations implementing the DON instrument do not contain a suspect classification. Being handicapped is not a historically suspect class such as race, national origin, or sex, nor is the right claimed a fundamental constitutional right. *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474 (7th Cir. 1985) (citations omitted). Thus, the question is whether there exists a rational basis for the regulatory distinctions made by the DON instrument. *Sutker v. Illinois State Dental Soc.*, 808 F.2d 632, 634 (7th Cir. 1986). When matters of health and safety are at issue, great judicial deference is owed to the legislative judgment. *Id.* (citing, *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955)).

We conclude that the DON classifications do bear a rational relationship to a legitimate legislative end. A health measure does not need to entirely eliminate a problem; the "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Vaden v. Maywood*, 809 F.2d 361 (7th Cir. 1987), *cert. denied*, 482 U.S. 908 (1987) (citations omitted). Ill. Rev. Stat. ch. 23, para. 6104.02 requires the

DOA to "establish a program . . . to prevent unnecessary institutionalization of persons age 60 and older in need of long term care or who are established as persons who suffer from Alzheimer's disease or a related disorder . . . ." When it created the mandated program, the DOA established an evaluation process for determining eligibility. The evaluation process, using the DON instrument, assigns an equal capability score to all daily activities of the applicant. Plaintiffs allege that the DON's reliance on an assessment of daily activities gives greater consideration to individuals with physical disabilities than to those with mental impairments. We conclude, however, that the equal weighing used by the DON instrument rationally relates to the legislative goal of providing accurate and equitable scoring for all applicants. Thus, plaintiffs' claim alleging an equal protection violation is dismissed.

CONCLUSION

For the foregoing reasons, we conclude that the plaintiffs have failed to state a sufficient claim for injunctive relief. Accordingly, defendants' motion to dismiss is granted.

/s/ Charles P. Kocoras
United States District Judge

Dated: December 14, 1992

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

Frances J. et al

v. Case Number: 92 C 5190

Philip Bradley et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED plaintiffs' complaint is hereby dismissed. Plaintiffs to take nothing. Judgment entered.

Date December 14, 1992

H. STUART CUNNINGHAM
Clerk

/s/ Stephen C. Taylor
(By) Deputy Clerk